MALAYSIAN REPORTS

GOH JUNG SUAN & ANOR. v. WONG FOOT LIAN

[F.C. (Suffian L.P., Lee Hun Hoe C.J. (Borneo) and Ong Hock Sim F.J.) January 9, 1976]

[Kuala Lumpur — Federal Court Civil Appeal No. 26 of 1974]

Damages — Personal injuries — Damages for future loss of earnings — General damages for pain and suffering and loss of amenities — When appellate court can interfere with award.

In this case the High Court had awarded $23,400 for future loss of earnings and the sum of $48,000 by way of general damages for pain and suffering and loss of amenities. The appeal was against the quantum awarded.

Held: (1) the multiplier employed at arriving at the figure of $23.400 was on the high side, as the sum was for loss of earnings from June 24, 1969 to February 2, 1974, when the respondent will be about 40 years. The proper award should be $16,902;

(2) the respondent's age was 35 years at the time of the accident and this should have been taken into consideration in awarding damages for pain and suffering and loss of amenities. An award of $35,000 would be reasonable under this head.

Cases referred to:-

(1) *Chan Kum Fook* v. *Wong Siew Kay* Singapore Suit No. 848 of 1970 (unreported).

(2) *Jag Singh* v. *Toong Fong Omnibus Co. Ltd.* [1964] M.L.J. 463, 465.

(3) *Wong Khang Jong* v. *Ali & Anor.* [1970] 1 M.L.J. 56, 57.

FEDERAL COURT.

E. C. Khoo for the appellants.

S. S. Chan for the respondent.

Ong Hock Sim F.J. (delivering the judgment of the Court): This appeal only concerns quantum and seeks intervention of this court in regard to the sum of $23.400 for future loss of earnings and the sum of $48,000 by way of general damages for pain and suffering and loss of amenities.

An appellate court is loth to interfere with an award made by the trial court. We do so now only because we are of the view that the learned judge had overlooked the fact that the sum of $8,100 was for loss of earnings from June 24, 1969 to February 2, 1974 and the respondent would then be almost 40 years. The multiplier employed in arriving at the figure of $23,400 was therefore on the high side and we would agree with appellants' counsel that using the Whitaker table at 6% per annum interest, the proper award would be $16,902 and we accordingly vary this award.

For the award of $48,000, the judge accepted *Chan Kum Fook* v. *Wong Siew Kay & Anor.*[1] as one where the injuries suffered "most closely approximates" those suffered by the respondent. Those details appear at page 42 of the record. As the Privy Council said in *Jag Singh* v. *Toong Fong Omnibus Co. Ltd.*[2]: —

"Caution has to be exercised when paying heed to the figures of awards in other cases. This is particularly so where cases are merely noted but not fully reported. It is necessary to ensure that in main essentials the facts in one case bear comparison with the facts of another before any comparison between the awards in the respective cases can fairly or properly be made."

It is to be observed that $48,000 was the sum awarded to Chan Kum Fook whose age was 22 years. The respondent's age was 35 years at the time of the accident. The observations made by Ong, C.J. in *Wong Khang Jong* v. *Ali & Anor.*[3] seem appropriate and may be quoted: —

"There was probably little difference in the extent of pain endured in both cases. Yet two persons were given identical awards...".

With respect, the learned judge has not stated whether he gave any, if at all, consideration to this age factor in awarding an identical amount, other than a reference to a chance of developing epilepsy. The evidence of the neuro-surgeon discounts this aspect. We are not referred to any comparable award but in view of the cranial damage, there, however, being no shortening of the expectation of life, we think an award in the sum of $35,000 reasonable and we would therefore vary the award under that head accordingly.

We would make no order as to costs.

Order accordingly.

Solicitors: *Khoo & Sidhu; Murphy & Dunbar.*

EH RIYID v. EH TEK

[F.C. (Suffian L.P., Raja Azlan Shah and Wan Suleiman F.JJ.) January 19, 1976]

[Kota Bharu — Federal Court Civil Appeal No. 4 of 1974]

Practice and Procedure — Claim by beneficiary of estate — Not made in representative character — Other beneficiaries not joined — Whether suit maintainable — R.S.C. 1957, O.16 rr.8 & 9, O.25 r.2.

The plaintiff had brought an action to correct an error in the land register. The land belonged to the plaintiff's grandmother. The plaintiff was one of the beneficiaries of the estate of the grandmother but he did not join the other beneficiaries as plaintiffs nor was the action brought as a representative action. On a preliminary objection, the learned judge in the High Court dismissed the action. On appeal,

Held, (Raja Azlan Shah and Wan Suleiman F.JJ., Suffian L.P. dissenting) dismissing the appeal: that the learned trial judge was correct in dismissing the action.

Cases referred to:-

(1) *Tuan Man & Anor.* v. *Che Som & Ors.* (1930) 1 M.C. 134.

(2) *Markt & Co. Limited* v. *Knight Steamship Company Limited* [1910] 2 K.B. 1021.

(3) *Beeching* v. *Lloyd* 3 Drew 227.

(4) *Duke of Bedford* v. *Ellis & Ors.* [1901] A.C. 1, 8.

(5) *Taff Vale Railway* v. *Amalgamated Society of Railway Servants* [1901] A.C. 421, 442, 443.

(6) *Meux* v. *Maltby* (1818) 2 Sw. 277.

(7) *Commissioners of Sewers* v. *Gellatly* (1876) 3 Ch.D. 615.

(8) *Pegang Mining Co. Ltd.* v. *Choong Sam & Ors.* [1969] 2 M.L.J. 52, 55.

(9) *Federal Flour Mills Ltd.* v. *Owners of the Vessel "Ta Tung" & Anor.* [1970] 2 M.L.J. 147.

(10) *Guarantee Trust Company of New York* v. *Hannay & Co.* [1914-15] All E.R.Rep. 24.

(11) *Letchumanan* v. *Kok Seng Fatt* [1973] 1 M.L.J. 171.
(12) *In re Cheong Soon Piang, Lau Poh Yoke & Anor.* v. *Cheong Weng Moon* (1954) 2 M.C. 214.
(13) *Meriam binti Daud & Ors. v. Saud bin Kancil* F.C. Civil Appeal No. 128 of 1971.

FEDERAL COURT.

Datuk Wan Mustapha for the appellant.

A. Wilson for the respondent.

Suffian L.P.: There are three judgments in this appeal, and in their absence I shall read first the judgment of my brother Raja Azlan Shah F.J., and then that of my brother Wan Suleiman F.J., followed by mine.

Raja Azlan Shah F.J. (read by Suffian L.P.): This appeal raises the question whether a beneficiary of a deceased's estate may institute proceedings to correct an error entered in the land register without joining the other beneficiaries.

The learned trial judge seems to think that Order 16 rule 9 is not applicable where the subject-matter concerns the estate of a deceased person. He added that failure to consult the other beneficiaries is fatal to the plaintiff's claim and reliance was placed on the Privy Council decision in *Tuan Man and Another* v. *Che Som and Ors.*[1] for the proposition that all the other beneficiaries should be joined as co-plaintiffs.

To my mind where as here there are 4 persons with individual rights of their own, there are two ways in which actions may be brought to establish their respective rights in one and the same action. One is to resort to Order 16 rule 1, by joining all of them as plaintiffs; the other is under Order 16 rule 9 by one named person bringing a representative action in respect of himself and numerous other persons. These are two distinct modes of procedure and they apply to widely different types of cases. The relation of the parties in these two types of cases also differs, as does the effect of the judgment. The policy of Order 16 rule 1 is to prevent repetition of cases of the same character and to save unnecessary expense. The plaintiffs are joined together by consent and are endowed with the status and responsibilities of ordinary litigants, for example, are liable for costs if they fail, and can be ordered to give discovery or to answer interrogatories.

In a representative action the plaintiff is the self-elected representative of himself and others. He does not have to obtain the consent of the other persons whom he purports to represent, and they are not liable for costs, though by estoppel and *res judicata* they will be bound by the result of the case — see *Markt & Co. Limited* v. *Knight Steamship Company Limited.*[2] The requisite of a representative action is that the persons who are to be represented must have the same or common interests as the plaintiff in one and the same cause or matter, although it may result in the case of each of them in different measure of relief — (see *Markt & Co. Limited* v. *Knight Steamship Company Limited*), or relief common to all of them — (see *Beeching* v. *Lloyd*[3]). Order 16 rule 9 is to be interpreted as declaratory of the old Court of Chancery practice with regard to representative action. The most authoritative statement on Order 16 rule 9 is that stated by Lord Macnaghten in the case of *The Duke of Bedford* v. *Ellis and Others*: [4]

"Under the old practice the court required the presence of all parties interested in the matter in suit, in order that a final end might be made of the controversy. But when the parties were so numerous that you never could "come at justice," to use an expression in one of the older cases, if everybody interested was made a party, the rule was not allowed to stand in the way. It was originally a rule of convenience: for the sake of convenience it was relaxed. Given a common interest and a common grievance, a representative suit was in order if the relief sought was in its nature beneficial to all whom the plaintiff proposed to represent."

Lord Lindley said of the rule in *Taff Vale Railway* v. *Amalgamated Society of Railway Servants*[5] as follows:

"The rules as to parties to common law actions were too rigid for practical purposes when those rules had to be applied to such societies. But the rules as to parties to suits in equity were not the same as those which governed courts of common law, and were long since adapted to meet the difficulties presented by a multiplicity of persons interested in the subject-matter of litigation. Some of such persons were allowed to sue and be sued on behalf of themselves and all others having the same interest. This was done avowedly to prevent a failure of justice: see *Meux* v. *Maltby* [6] and the observations of Sir George Jessel M.R.[7]

The principle on which the rule is based forbids its restriction to cases for which an exact precedent can be found in the reports. The principle is as applicable to new cases as to old, and ought to be applied to the exigencies of modern life as occasion requires. The rule itself has been embodied and made applicable to the various Divisions of the High Court by the Judicature Act, 1873."

In my opinion, Lord Lindley's statement illustrates the undesirability of propounding general propositions wider than are strictly necessary for the determination of each case. The question before us arises under Order 16 rule 9. Under that rule the plaintiff, a named person, may institute proceeding without joining the other beneficiaries. But he must as the rule requires bring the action in a representative capacity. It is in my opinion not correct to interpret the rule as implying that it allows a person to bring an action without stating on the writ that he brings it in a representative capacity. That interpretation offends the language of the rule and the authoritative statements given to it and I can find in none of them the slightest justification for bringing a representative action under such circumstances as in the present case.

It was also argued on behalf of the plaintiff that nonjoinder of the other beneficiaries is not fatal to his claim. Order 16 rule 11 which was relied in support provides: "No cause or matter shall be defeated by reason of the misjoinder or nonjoinder of parties." My view of the matter is that it is a rule pertaining to adding of parties and which affects the right of a person if judgment is passed in his absence and without giving him an opportunity of being heard. The rule must be looked as a whole and the key of the whole rule is that no cause or matter shall be defeated by reason of the misjoinder or nonjoinder of parties, which means that if the court cannot decide the question without the presence of other parties, the cause is not to be defeated, but the parties are to be added so as to put the proper parties before the court.

I would quote a passage from the speech of Lord Diplock in *Pegang Mining Co. Ltd.* v. *Choong Sam & Ors.*[8] on the scope of the rule:

"In their Lordships' view one of the principal objects of the rule is to enable the court to prevent injustice being done to a person whose rights will be affected by its judgment by proceeding to adjudicate upon the matter in dispute in the action without his being given an opportunity of being heard."

See also my own judgment in *Federal Flour Mills Ltd.* v. *Owners of the Vessel "Ta Tung" & Anor.*[9].

It follows that in approaching the problem we have to seek to solve on this appeal the rule cited by counsel must be approached with caution. It is only relevant and helpful if it is applicable to this dispute.

I would dismiss the appeal with costs.

Wan Suleiman F.J.: This is an appeal from the decision of the High Court Kota Bharu wherein the learned judge dismissed the claim of the plaintiff/appellant, on a preliminary objection successfully raised by the defendant/respondent.

Paragraphs 3 to 7 of the appellant's Statement of Claim read as follows:—

"3. The grand-mother of the plaintiff named Ke Ding anak Eh Kir, deceased, was the original owner of land Lot No. 868, Mukim Selehong South, Daerah Terbak (hereinafter referred to as the said land) as shown in the Abstract of Title hereto annexed and marked 'P1'.

4. The plaintiff's said grand-mother died about 40 years ago and upon her death the plaintiff applied for distribution of her Estate at the Land Office, Kota Bharu, in about the year 1935 and at about the same time one Cha Tong anak Cha Pit also applied for distribution of the Estate of his uncle whose name was Cha Ding anak Cha Kiau (Eh Kir, Eh Pa) deceased.

5. After the settlement of his grandmother's Estate the plaintiff was at all times in the belief that the said land was transmitted to him and continuously occupied the same up to this day without any interference from anybody.

6. Some time in 1962 the plaintiff came to know that the said land was registered in the name of the said Cha Tong anak Cha Pit by mistake arising out of the confusion of the names between plaintiff's grandmother named Ke Ding anak Eh Kir and Cha Ding Keding anak Cha Kiau (Eh Kir, Eh Pa) as per copy of the Order of Mahkamah Tanah, Kota Bharu, hereto annexed and marked 'P2' and the plaintiff brought the matter to the attention of the District Officer of Tumpat to rectify such mistake but the said Cha Tong anak Cha Pit died before any enquiry could be held in respect of the said land. However the District Officer took cognizance of the plaintiff's claim and had the said land caveated absolutely as shown in the Exhibit 'P1' aforesaid.

7. Upon receipt of service of a civil action (Tumpat Sessions Court Civil Action No. 1 of 1967) by the defendant, the plaintiff realised that the said land was transferred to the defendant as a result of settlement of the Estate of the said Cha Tong anak Cha Pit, deceased, on which application the plaintiff was not aware."

The appellant prayed for judgment as follows:—

(a) To put aside the Order of the Mahkamah Tanah, Kota Bharu dated October 3, 1935.

(b) To declare the registration of the land Lot No. 868, Mukim Selehong South, Daerah Terbak into the name of Cha Tong anak Cha Pit under the aforementioned order to be null and void.

(c) The said Land Lot No. 868, Mukim Selehong South, Daerah Terbak be reverted to the Estate of Ke Ding anak Eh Kir deceased and then be transmitted to the plaintiff.

(d) Costs of the Suit.

The respondent denied the appellant's claim and in paragraphs 3 to 7A of the Amended Statement of Defence stated:—

"3. The defendant avers that the original owner of the said Lot 868 was Cha Ding Keding anak Cha Kiau (Eh Kir, Eh Pa), but registered in the document of title as Ke Ding anak Eh Kir, the father of Chatong anak Che Pit by adoption.

4. Upon the death of the said Che Ding Keding anak Cha Kiau (Eh Kir, Eh Pa) the said Lot was transmitted to and registered in the name of Chatong anak Che Pit on October 3, 1935. The said Chatong anak Che Pit was the uncle of the defendant.

5. From about 1931 after the death of the said Cha Ding Keding anak Cha Kiau (Eh Kir, Eh Pa) the plaintiff unlawfully occupied the said lot because the said Chatong anak Cha Pit was weak and mentally unbalanced till his death and physically incapable of managing the said land.

5A. The defendant purchased the land from the said Chatong anak Cha Pit on or about February 26, 1965 for $2,000/-.

6. Upon the death of the said Chatong anak Cha Pit, the said Lot was transmitted to and registered in the name of the defendant.

7. The defendant therefore avers that he is the real owner and registered proprietor of the said Lot.

7A. The defendant in the alternative avers that the plaintiff claim is barred by limitation under the provisions of the Limitation Ordinance."

In addition he counter-claimed for vacant possession, accounts, damages and costs.

When the appellant led evidence which indicated that his deceased grandmother was survived not only by his mother now deceased but also by another daughter who died after his mother, leaving two sons and a daughter who are still alive, counsel for the respondent raised a preliminary objection that the appellant was not proper party.

Datuk Wan Mustapha for the appellant submitted that this court could at least make the declaration he sought and referred to O. 25 r. 5 and cited among other authorities the decision in *Guarantee Trust Company of New York* v. *Hannay & Co.*[10].

Looking at prayers (b) and (c) and the Statement of Claim, it seems to me that a mere declaration that the registration of the land, Lot No. 868 Mukim Selehong South, Daerah Terbak, in the name of Cha Tong anak Cha Pit is null and void would be a mere exercise in futility unless it is followed by an order in terms of prayer (c) which would result in transmission of the land to the appellant alone.

This point was never raised in the High Court because as the learned trial judge noted there was nothing in the Statement of Claim itself which would indicate to the respondent that there were other beneficiaries apart from the plaintiff. As I shall be referring in full to that part of his judgment which deals with this preliminary objection, I need only say here that this disposes of the appellant's argument that since respondent had not in his pleadings objected to appellant's *locus standi*, this court should refuse to hear argument on this point in accordance with the decision of this court in *Letchumanan* v. *Kok Seng Fatt.*[11]

I shall now set out in full that part of the judgment in which the learned trial judge dealt with this preliminary objection:

"It was contended that the action must be instituted either by all the beneficiaries or by the administrator of the deceased's estate as provided by O. 16 r. 8 of the Supreme Court Rules, 1957 which reads as follows:

'8. Trustees, executors and administrators may sue and be sued on behalf of or as representing the property or estate of which they are trustees or representatives, without joining any of the persons beneficially interested in the trust or estate, and shall be considered as representing such persons; but the court or judge may, at any stage of the proceedings, order any of such persons to be made parties, either in addition to or in lieu of the previously existing parties.'

5. As there was no indication at all in the Statement of Claim that there was any other beneficiary to deceased's estate beside plaintiff it was not surprising that this particular point of law had not been pleaded in the defence under O. 25 r. 2 but as stated in Mallal's Supreme Court Practice, Vol. 1, at page 317 'Recourse to this rule does not prevent the defendant from raising any other point of law at the trial. A point of law need only be pleaded where the defendant desires to proceed under this Orders.'

6. It was contended by Counsel for plaintiff (who apparently had not been instructed by plaintiff of the existence of the other beneficiaries even up to the commencement of the hearing) that O. 16 r. 9 was applicable in this case, particularly when prayer (c) had asked for the land to be reverted to the estate of his deceased grandmother. The said r. 9 reads as follows:

'9. Where there are numerous persons having the same interest in one cause or matter, one or more of such persons may sue or be sued, or may be authorised by the court or a judge to defend in such cause or matter, on behalf or for the benefit of all persons so interested.'

7. In my view the said r. 9 was not applicable in a case like this one where the subject-matter was the estate of a deceased person.

8. Even assuming that the said r. 9 was applicable in a case like this one it was obvious from plaintiff's Statement of Claim that he was not claiming on behalf or for the benefit of all the beneficiaries of the deceased's estate. It was true that prayer (c) had asked for the said land to be reverted to the deceased's estate but it had also gone further and asked that after such reversion the said land be transmitted to him alone.

9. Counsel for plaintiff had also asked the court to invoke O. 16 r.11 but I did not consider this a proper case where the court should intervene particularly when there was no indication that the 3 other beneficiaries were even consulted by plaintiff before he took this action."

His Lordship, in remarking that there was no indication that the other relatives had been consulted, no doubt had in mind that part of O.16 r. 11 which reads:

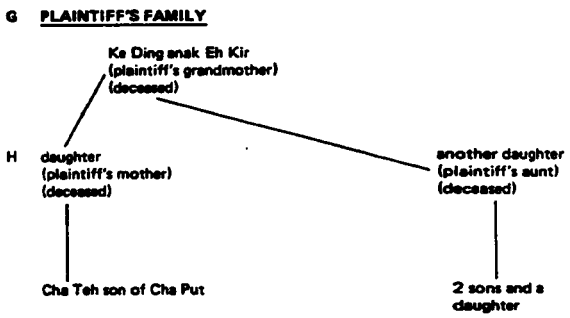
"No person shall be added as a plaintiff suing without a next friend ... without his own consent in writing thereto."

Mr. Wilson drew our attention to the Privy Council decision in *Tuan Man and Another* v. *Che Som and Ors.*[1] as authority for the proposition that if the appellant claims property which forms part of his grandmother's estate, then all other beneficiaries should be joined as co-plaintiffs. I would say that he is correct.

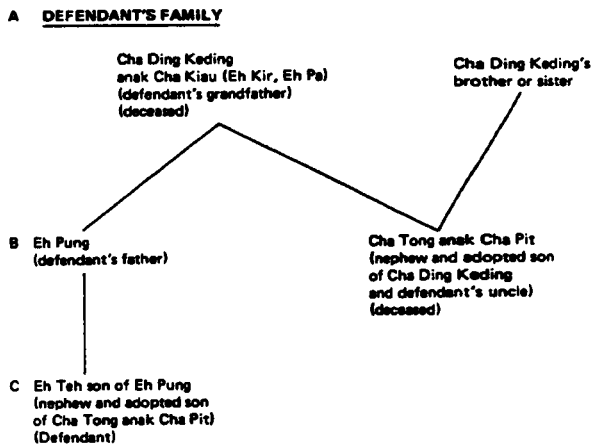
I would therefore agree with the decision arrived at by the learned trial judge, and dismiss this appeal with costs here and in the court below. There shall also be no order on the counterclaim and the respondent shall be at liberty to institute fresh proceedings in respect thereof.

Suffian L.P.: There are two families involved in this land dispute. They are not related. Their family trees are shown below.

PLAINTIFF'S FAMILY



DEFENDANT'S FAMILY



Ke Ding anak Eh Kir (a lady) had a daughter who married Cha Put and they had a son Cha Teh (the plaintiff); and another daughter survived by two sons and a daughter.

Cha Ding Keding had a son named Eh Pung who had an adopted son Eh Tek (the defendant).

It will be seen at once that there is some degree of similarity between the names of the plaintiff's grandmother and the defendant's adoptive grandfather. It is the confusion between the two names that has given rise to this dispute.

The plaintiff's grandmother died in or about the year 1928. She was the registered proprietor of the land in dispute. The plaintiff applied for distribution of her estate at the Land Office, Kota Bharu, in or about the year 1935. As a result of an order of the Land Office, the land was registered in the name of Cha Tong on October 3, 1935. Since then and until 1970 the plaintiff has been in continuous occupation of the land without interference by anybody, and all

that time the plaintiff had been under the impression that the land had been transmitted to him. After 1970 the defendant got possession.

Only in 1962 did the plaintiff discover that the land had been registered in the name of Cha Tong anak Cha Pit. The plaintiff pleaded that Cha Tong came on the register by mistake, as a result of the confusion of the names between (a) the plaintiff's grandmother, namely Ke Ding anak Eh Kir, and (b) Cha Tong's adoptive father, namely, Cha Ding Keding anak Cha Kiau (Eh Kir, Eh Pa), that later Cha Tong died and the land was then transmitted to the defendant.

The plaintiff sued the defendant praying for judgment —

(a) to put aside the order of the Land Office, Kota Bharu, dated October 3, 1935;

(b) to declare the registration of the land in the defendant's name as null and void; and

(c) that the land be reverted to the estate of the plaintiff's grandmother and then be transmitted to the plaintiff.

There were several defences, and also a counterclaim for vacant possession and damages.

In the course of the plaintiff's evidence it appeared that at the time of the trial the plaintiff's grandmother had three other beneficiaries apart from the plaintiff. Counsel for the defendant objected to the suit, arguing that the plaintiff was not the proper party to bring it. The learned judge agreed and dismissed the plaintiff's claim solely on this ground, but gave liberty to the proper party to institute a fresh action, and made no order on the counterclaim.

The plaintiff appeals to us.

The learned judge in his judgment referred to O. 16 r. 8 and r. 9 and O. 25 r. 2, which read as follows:

"O. 16 r. 8. Trustees, executors, and administrators may sue and be used on behalf of or as representing the property or estate of which they are trustees or representatives, without joining any of the persons beneficially interested in the trust or estate, and shall be considered as representing such persons; but the court or a judge may, at any stage of the proceedings, order any of such persons to be made parties, either in addition to or in lieu of the previously existing parties.

This Rule shall apply to trustees, executors and administrators, sued in proceedings to enforce a security by foreclosure or otherwise.

r. 9. Where there are numerous persons having the same interest in one cause or matter, one or more of such persons may sue or be sued, or may be authorised by the court or a judge to defend in such cause or matter, on behalf or for the benefit of all persons so interested."

"O. 25 r. 2. Any party shall be entitled to raise by his pleading any point of law, and any point so raised shall be disposed of by the judge who tries the cause at or after the the trial, provided that by consent of the parties, or by order of the court or a judge on the application of either party, the same may be set down for hearing and disposed of at any time before the trial;"

and held that the plaintiff was not the only beneficiary of his grandmother's estate and that as the plaintiff was not only asking for this land to revert to his grandmother's estate but also that it should be vested in him alone beneficially, he was not the proper person to bring this action. Counsel for the plaintiff sought to save the suit by citing O. 16 r. 11 which provides that "no cause or matter shall be defeated by reason of the misjoinder or nonjoinder of parties", but the learned judge held that that did not help, as there was no indication that the other three beneficiaries were even consulted before the plaintiff launched this action.

Before us counsel for the defendant sought to support the judgment appealed from, by relying on *Tuan Man and Another* v. *Che Som and Others*;[1] *In re Cheong Soon Piang, Lau Poh Yoke and Another* v. *Cheong Weng Moon*[12] and *Meriam binti Daud and Others* v. *Saud bin Kancil*.[13]

With respect I think that the learned judge was in error in dismissing the plaintiff's claim on the ground that he was not the proper party to bring this suit. None of the rules cited by him is authority for the proposition that a beneficiary alone may not bring a suit claiming part of the deceased's estate of which he says he is a beneficiary, or authority for the proposition that only all the beneficiaries together may bring such a suit and against the legal personal representative of the deceased's estate. In my judgment, a beneficiary alone may bring a suit to recover for the estate any land that is registered in a party that is not a beneficiary and that such a suit may be brought against the person whose name has allegedly been wrongly registered as proprietor. Indeed this is clearly implied from O. 16 r. 9 reproduced above.

Here the plaintiff has prayed for a declaration not only that the land revert to his grandmother's estate but also that it then be transmitted to him alone. With respect, I do not think that this is fatal to his claim. As the evidence shows that there are other beneficiaries to the old lady's estate, the court can, if the plaintiff proves his case, simply order that the land revert to the old lady's estate, and leave the question of distribution to be dealt with separately.

I would therefore have allowed this appeal.

But as I am in a minority, this appeal is dismissed, so that the order of the learned trial judge stands. Accordingly the proper party is at liberty to bring a fresh action and the defendant is at liberty to bring a fresh action in respect of his counterclaim.

The plaintiff to pay costs here and below and his deposit to the defendant against his taxed costs.

Appeal dismissed.

Solicitors: *Wan Mustapha & Co.; Wilson & Co.*